

LIM KIM CHAI v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) September 9, 1962]

[J.B. — Criminal Appeal No. 18 of 1962]

Customs — Uncustomed goods — Conveyance of — Proof of knowledge and intention to defraud — Customs Ordinance, 1952, s.131(1)(e) and (2) — Presumption under sub-section (2) of s.131 — Burden of proof.

On a charge under section 131(1)(e) of the Customs Ordinance, 1952, the prosecution must prove (a) the accused was knowingly concerned in conveying uncustomed goods, and (b) at the time the accused was conveying the uncustomed goods, he was doing so with the intention to defraud the Government. The effect of the presumption in section 131(2) was to place on the accused the burden of satisfying the court on the balance of the probabilities that he did not know that they were uncustomed. That subsection has in no way affected the duty of the prosecution to prove the intention to defraud. However, that intent could be presumed from the evidence.

Any person who brings goods into the Federation without declaring them or producing them to the customs does so at his own peril. It is the act of a prudent man to enquire, if he is in any doubt, from customs whether or not a specific article carries duty. If he does not do this, then he cannot complain if the prosecution ask the Court to presume that in not doing so he intended to defraud the Government. The question of the intention to defraud remains at all times to be proved by the prosecution in the same way as "intention" is proved in all criminal cases where guilty knowledge is one of the ingredients of the offence.

In this case the learned President omitted to consider the whole of the evidence in the light of the fact that before he could convict there must be proved to his satisfaction an intention to defraud the Government.

Held: the apparent omission on the part of the President to consider the question of intention may as well have occasioned a miscarriage of justice and his omission to deal with it is an error in law.

Cases referred to:—

- (1) *R. v. Steane* [1947] 1 All E.R. 813.
- (2) *R. v. Murtagh & Kennedy*, 39 Cr. App. R. 72.
- (3) *Welham v. Director of Public Prosecutions*, 44 Cr. App. R. 124.

MAGISTRATE'S CRIMINAL APPEAL.

Yap Tyou Min for the appellant.

Raja Azlan Shah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Adams J.: This is an appeal against the judgment of the learned President, Sessions Court at Johore Bahru whereby he convicted the accused of an offence under section 131, subsection (1)(e) of the Customs Ordinance (No. 42 of 1952) and fined him the sum of \$300. As will be seen later the facts are of some importance and I will set them out in some detail. Lim Kim Chai, the accused, is 25 years of age and lives in Muar where he works in a biscuit factory. He said that he borrowed the car BF 8026 from a friend of his and with three others left Seremban on the evening of the 23rd April. He arrived in Singapore on the morning of the 24th. He said it was his first visit. He bought some things in Singapore quite a few of which could be classified as children's toys, some of these were dutiable and some were not. He left again for the Federation on the evening on the 24th April, and arrived at the Johore Customs Gate at just

after midnight. It was not disputed that he must have passed through the customs control. He was unable to identify the proper officer of customs who passed him through. His own version is that he was stopped and the customs officer on duty asked him what things he had with him. He said 'Children's toys'. The customs officer put his head into the motor car which was a Morris 'Mini Minor'. I think that I should also add that there was a considerable amount of 'goods' and they must have been clearly visible to the officer of customs in the Mini Minor which is a small car when he put his head into it. The accused was then passed through by the officer of customs. To those of us who live in Johore Bahru it is well known that such procedure is the normal procedure at the gate, and I see no reason to doubt that that is what in fact happened. But before this, information had been received concerning this car, and customs officers were waiting for it in Johore Bahru Town. They followed the car until it stopped in Jalan Ah Fook, and they then went back to it. They found that the car had the goods in it which were exhibited in Court. There were some 18 different items, 14 of which were dutiable. They consisted of diverse merchandise some of which could certainly not be described by any stretch of imagination as 'children's toys', for example 17 'national' dry batteries, 25 rolls of unexposed photographic film. The rest might I suppose be said to be usable by children as toys, e.g. the Plastic Roulette wheels, and the "Friendship" pencils. Therefore it can be said that the majority of the goods were of the nature of children's toys. It was admitted by the accused in a statement that he made voluntarily to a proper officer of customs after caution that the goods were his and he bought them for the purposes of trade.

It was submitted by Mr. Robert Yap who also appeared in the Court below that the prosecution must prove firstly, that the accused was knowingly concerned in conveying uncustomed goods, and secondly, on the authority of *R. v. Steane* ⁽¹⁾ that at the time the accused was conveying the uncustomed goods, that he was doing so with the intention to defraud the Government. He conceded that the goods here were uncustomed within the meaning ascribed to that word in section 2 in that they were undoubtedly dutiable goods, and they had been imported into the Federation without duty being paid on them. He therefore conceded that the effect of the presumption in section 131, subsection (2) was to place on the accused the burden of satisfying the Court on the balance of the probabilities that he did not know that they were uncustomed. But he went on to argue that section 131, subsection (2) in no way affected the duty of the prosecution to prove the intention to defraud. In that submission Mr. Yap is perfectly correct. He went on to submit that there was no proof of any intention to defraud in this case. He referred to the facts and said that the accused's explanation was reasonable, and that he had been told to go on after he had submitted to examination. He con-

ceded that the accused might well be guilty of some other offence in view of the duty to declare placed by section 99 upon a person bringing dutiable goods into the Federation. That being so, it was the duty of the learned President to consider the accused's evidence and his statement to the customs on the 25th April and then consider on the whole of the evidence whether he accepted that that evidence in fact established an intention to defraud, or he accepted the accused's evidence that since the customs officer at the gate had looked into the car and told him to carry on that he was under the honest impression that the goods were not dutiable, in which case he should have acquitted the accused. Furthermore short of accepting the accused's explanation, if that explanation left the learned President in any doubt, he should also have acquitted (see *R. v. Murtagh & Kennedy*)⁽²⁾. He then complained that the learned President had not considered the defence, his submissions nor the authority of *R. v. Steane*⁽¹⁾ which he cited to him in the lower Court.

Raja Azlan Shah who appeared for the Public Prosecutor conceded that the prosecution had to prove the intent to defraud, but argued that intent could be presumed from the evidence (see the judgment of Lord Justice Denning in *Welham v. Director of Public Prosecutions*)⁽³⁾. In this submission the learned legal adviser is also correct. He argued that here the accused, who must be presumed to know what is dutiable and what is not, must have intended to defraud the Government. He said that any person who goes through the customs gate with dutiable goods and does not declare them must, on the normal basis of the standards of the 'reasonable man', intend to evade the payment of duty, and that in itself is evidence of the necessary intention to defraud. He conceded that the learned President had not considered the question of the intention to defraud, but argued that there was abundant evidence on the record which established such an intent. He submitted that the error of the learned President was covered by section 422 of the Criminal Procedure Code, but if I were not disposed to use that section then he asked for a new trial.

I would say at the outset that in my opinion any person who brings goods into the Federation without declaring them or producing them to the customs does so at his own peril. It is the act of a prudent man to enquire, if he is in any doubt, from customs whether or not a specific article carries duty. If he does not do this, then he cannot complain if the prosecution ask the Court to presume that in not doing so he intended to defraud the Government. Therefore if a person is found, as was the accused in this case, in the Federation conveying goods which carried duty and the duty on the goods he was carrying had not been paid, he cannot complain if at the end of the case for the prosecution he is called upon to make his defence to the charge that he conveyed such uncustomed goods knowingly and with intent to defraud the Government. But the

A case must be resolved on the whole of the evidence and even if the learned President did not accept the accused's explanation as to why he said he had not any intention to defraud, it was still his duty to consider his evidence, and then, having considered it deciding whether, short of accepting it, it left him in any doubt. If he had any doubt then he must also acquit. Mr. Yap in arguing the appeal before me built up a very strong argument on the facts which he said negatived on the balance of probabilities, the *prima facie* case established by the prosecution. I am not in a position, sitting here, to say how I would have interpreted the accused's actions and weighed them in the light of all the evidence. I do not think, therefore, that this is a case in which section 422 of the Criminal Procedure Code should be invoked. The learned President's omission to consider the whole of the evidence in the light of the fact that before he can convict there must be proved to his satisfaction an intention to defraud the Government was a serious error in law. The necessity to prove this intent had been brought to his attention forcibly by Mr. Yap and conceded by the prosecutor, Acting Assistant Comptroller of Customs, Mr. Lee Yat Chong, who conducted the prosecution with his usual great fairness and ability. I think, therefore, that the apparent omission on the part of the President to consider the question of the intention may well have occasioned a miscarriage of justice and his omission to deal with it is an error in law. Furthermore he appears to have based the finding of guilty on the failure of the accused to rebut statutory presumptions. By that I presume that he means the presumptions in section 132(2), but this section only deals with the question of 'knowledge' in relation to the conveying of uncustomed goods. The question of the intention to defraud remains at all times to be proved by the prosecution in the same way as 'intention' is proved in all criminal cases where guilty knowledge is one of the ingredients of the offence. I do not think the conviction ought to stand.

I do not feel disposed in this particular case to order a new trial. The total amount of the duty evaded was only \$32.70. The accused is of good character in that he has had no previous convictions. He is a labourer in a biscuit factory earning about \$100 per mensem. Taking all these factors into consideration, I think it would be an imposition to ask him to go through all this again. That I am not ordering a re-trial is no reflection either on the customs who investigated and prosecuted this case with their usual efficiency or fairness, or on the Deputy Public Prosecutor who asked for it. I merely feel that generally on the facts of this particular case, the interests of justice would be better served by taking the more humane course.

I therefore allow the appeal and quash the conviction. The fine of \$300 must be returned to the appellant.

Appeal allowed.

Solicitors: *Battenberg & Talma.*